IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 62579-9-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
ANTONIO JAKU JAKO,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: March 8, 2010
	)	
	)	

Cox, J. – Antonio Jako challenges his conviction for felony harassment based on a threat to cause bodily injury. He contends that a "true threat" is an essential element of felony harassment and that, because this was not included in the information charging him or defined in the "to convict" instruction, his conviction must be reversed. Because the definition of "true threat" need not be included either in the information or the "to convict" instruction so long as it is included in a definitional instruction, which was done here, we affirm.

Jako and Shontrell Franks had a three year relationship that resulted in the birth of a daughter. They broke up and remained amicable for about a year. On March 24, 2008, Jako contacted Franks and requested a visit with his daughter. Franks refused and Jako became angry. That evening, after Franks left her place of work, she went to her cousin's house. While she was there, she received a number of phone calls from Jako threatening to harm her and

damage her apartment.

When Franks returned to her apartment later that evening she found that it had been damaged and called the police. While Deputy A. R. Buchan was at the apartment with Franks, her cousin received a phone call from a male identifying himself as Jako. The call was put on speaker phone. At one point during the conversation, Jako stated, "You know now that I can get [Franks] whenever I want to get her, and the next time I am going to kill her."

The State charged Jako by amended information with one count of residential burglary with a domestic violence designation and one count of felony harassment. The charging information on the felony harassment count did not allege that the threat was a "true threat." And the "to convict" instruction did not include the definition of a "true threat." A jury convicted Jako as charged.

Jako appeals.

TRUE THREAT

Jako contends that a "true threat" is an essential element of the crime of felony harassment, RCW 9A.46.020(1), (2), and, as such, must be included in the charging information and defined in the "to convict" instruction. We disagree.

"Because threats are a form of pure speech, a statute criminalizing threatening language 'must be interpreted with the commands of the First Amendment clearly in mind.'"[1] Consistent with this requirement, Washington

[1] State v. Tellez, 141 Wn. App. 479, 482, 170 P.3d 75 (2007) (quoting State v. Williams, 144 Wn.2d 197, 207, 26 P.3d 890 (2001)).

courts interpret statutes criminalizing threatening language as proscribing only true threats, which are not protected by the First Amendment.[2] A "true threat" is a "'statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life' of another person."[3]

On appeal, claimed instructional errors are reviewed de novo.[4]

Jako contends the requirement that the threat be a "true threat" is an element of felony harassment. But in State v. Tellez,[5] we held that the true threat concept itself was not an element of felony telephone harassment, so it did not need to be included in the charging document or defined in the "to convict" instruction.[6]

So long as the jury is instructed that the threat must be a "true threat," the defendant's rights are protected.[7] The question is whether a reasonable person in the defendant's place would foresee that in context, the listener would interpret the statement as a serious threat.[8]

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[2] Id. (citing State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004)).

[3] Id. (quoting Kilburn, 151 Wn.2d at 43).

[4] State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).

[5] 141 Wn. App. 479, 170 P.3d 75 (2007).

[6] Id. at 484.

[7] Id.

Here, the jury was instructed:

> Threat means to communicate directly or indirectly the intent to cause bodily injury in the future to the person threatened. To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat.[9]

This definitional instruction, though not in the "to convict" instruction, was sufficient to ensure that the jury would convict Jako only if it deemed his threat toward Franks a "true threat."

Jako urges us to revisit our analysis in Tellez, contending that the supreme court held that a "true threat" is an element of harassment crimes in State v. Johnston.[10] To the contrary, in Johnston, the court held that the "jury instructions given at trial were insufficient" because the "jury must be instructed that a conviction . . . requires a true threat and must be instructed on the meaning of a true threat."[11] Here, the jury was instructed as to the definition of a "true threat."

Division Three of this court also reached the same conclusion in State v. Schaler.[12] Examining the same statute at issue here, RCW 9A.46.020, that court

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[8] Kilburn, 151 Wn.2d at 46.

[9] Clerk's Papers at 50.

[10] Brief of Appellant at 9-10 (citing State v. Johnston, 156 Wn.2d 355, 366, 127 P.3d 707 (2006)).

[11] Johnston, 156 Wn.2d at 366.

concluded that a jury in a criminal harassment prosecution must be instructed on the concept of "true threat."[13] The court did not, as Jako suggests, decline to follow Tellez. Rather, the court noted that its decision was consistent with Tellez.[14]

> Furthermore, although Tellez held "true threat" was not an essential element of the crime of felony telephone harassment, another crime targeting "pure speech," the court affirmed that a "true threat" must be defined for the jury in order to protect a defendant's First Amendment rights. We conclude that a jury in a criminal harassment prosecution likewise must be instructed on the concept of "true threat." . . . The court erred in failing to instruct the jury on the definition of "true threat."[15]

In sum, none of the Washington cases cited by Jako stand for anything more than the proposition that the jury in a criminal harassment prosecution must be instructed as to the definition of a "true threat." The jury here was so instructed.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

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[12] 145 Wn. App. 628, 186 P.3d 1170 (2008).

[13] Id. at 640.

[14] Id.

[15] Id. (citation omitted).

Appelwick, J.

Grosse, J.